LEE THYE

v.

SOCIETE GENERALE CAWANGAN SINGAPURA

COURT OF APPEAL, PUTRAJAYA
MOHD GHAZALI YUSOFF FCJ
ABU SAMAH NORDIN JCA
SULAIMAN DAUD JCA
[CIVIL APPEAL NO: W-02-715-2003]
28 JULY 2009

CIVIL PROCEDURE: *Appeal - Adducing fresh evidence - Affidavit raising new defence of illegality - Whether evidence available at hearing - Whether evidence would have influenced court's decision - Conditions applicable - Rules of the High Court 1980, O. 56 r. 1(3A)*

The appellant, a Malaysian citizen, had defaulted on a credit facility of US$7m ('the facility') granted to her by the respondent, a French company with a branch office in Singapore. The facility was for the purpose of share financing and/or trading and was governed by the laws of Singapore. The respondent obtained summary judgment under O. 14 of the Rules of the High Court 1980 ('the RHC') against the appellant in its action to recover the amount owed with interest and costs before the senior assistant registrar ('SAR'). The appellant appealed to the judge in chambers.

Prior to the hearing of the appeal, the appellant applied to the judge for leave under O. 56 r. 1(3A) of the RHC to adduce as further evidence at the appeal, an affidavit sworn by her after the judgment of the SAR was delivered, alleging that she had signed the facility agreement as a nominee for her husband who had set up several facilities through various nominees as part of a scheme to unlawfully circumvent the single customer limit imposed under the laws of Singapore.

The application was refused and the appellant has appealed. The issue before the court was whether the judge had applied the correct tests when he dismissed the appellant's application to adduce further evidence.

Held (dismissing the appeal with costs)
Per Abu Samah Nordin JCA (Mohd Ghazali Yusoff FCJ concurring):

(1) The applicant must satisfy both the cumulative conditions in O. 56 r. 1(3A)(a) and (b) of the RHC, being that the new evidence must not have been available at the hearing even with reasonable diligence, and it was likely to have had a determining influence on the decision. (paras 15 & 17)

(2) The appellant's allegation of being her husband's nominee was a fact which was clearly within her own knowledge, but had not been raised during the hearing. It was also in direct conflict with other evidence against the appellant and the appellant's various defences put forward at the hearing. (para 18)

(3) The further evidence had no relevance to the action and would not have had or been likely to have had a determining influence upon the decision of the SAR. (para 20)

Per Sulaiman Daud JCA delivering separate concurring judgment (Mohd Ghazali Yusoff FCJ concurring):

(1) The two conditions in O. 56 r. 1(3A)(a) and (b) of the RHC are cumulative and not disjunctive.

(2) The appellant's allegation of illegality had not been pleaded as a defence at the hearing although it was within her special knowledge. The appeal would be dismissed on this ground alone.

(3) The further evidence was inconsistent and at variance with the earlier evidence as well as with the appellant's defences opposing the respondent's O. 14 application, and would have had no determining influence on the SAR's decision.

(4) The appellant by her affidavit sought not only to adduce fresh evidence but also introduce a new line of defence, which is outside the scope of O. 56 r. 1(3A) of the RHC.

[Order accordingly.]

Bahasa Malaysia *Translation Of Headnotes*

Perayu, seorang warganegara Malaysia, gagal membayar kemudahan kredit yang mempunyai had sehingga AS$7 juta ('kemudahan') yang diberikan kepadanya oleh responden, sebuah syarikat Perancis yang mempunyai cawangan di Singapura. Tujuan kemudahan tersebut ialah untuk mempermudahkan belian dan/atau dagangan saham dan ianya tertakluk kepada undang-undang Singapura. Responden berjaya mendapatkan penghakiman terus di bawah A. 14 Kaedah-kaedah Mahkamah Tinggi 1980 ('KMT') terhadap perayu untuk mendapatkan jumlah yang terhutang termasuk faedah dan kos selepas permohonan kepada penolong kanan pendaftar ('PKP'). Perayu membuat rayuan terhadap keputusan PKP kepada hakim di dalam kamar.

Sebelum pendengaran rayuan tersebut, perayu membuat permohonan kepada hakim untuk mendapatkan kebenaran di bawah A. 56 r. 1(3A) supaya mengemukakan keterangan tambahan di dalam rayuan, iaitu affidavit yang disumpah oleh perayu selepas penghakiman PKP diberikan, yang menyatakan bahawa perayu telah menandatangani perjanjian kemudahan itu sebagai penama (nominee) suaminya yang telah menubuhkan beberapa kemudahan serupa melalui penama-penama (nominees) berlainan di bawah suatu skim yang tidak sah yang bertujuan menyeleweng undang-undang Singapura yang mengenakan had atas pelanggan tunggal.

Permohonan tersebut ditolak and perayu membuat rayuan ini. Isu di hadapan mahkamah ialah sama ada hakim telah menggunakan ujian yang betul apabila beliau menolak permohonan perayu untuk mengemukakan keterangan tambahan.

Diputuskan (menolak rayuan perayu dengan kos)
Oleh Abu Samah Nordin HMR (Mohd Ghazali Yusoff HMP menyetujui):

(1) Pemohon mesti memuaskan kedua-dua syarat kumulatif yang terdapat di A. 56 r. 1(3A)(a) dan (b) KMT, iaitu keterangan baru tersebut semestinya tidak dapat dikemukakan semasa pendengaran kes walaupun dengan ketekunan berpatutan, dan ianya mungkin mempunyai pengaruh yang menentukan keputusan mahkamah.

(2) Kenyataan perayu bahawa beliau hanya penama suaminya adalah suatu fakta di dalam pengetahuannya sendiri, tetapi ianya tidak dikemukakan semasa pendengaran. Kenyataan itu

juga terus bertentangan dengan keterangan lain terhadap perayu dan pelbagai pembelaan yang ditimbulkan oleh perayu semasa pendengaran itu.

(3) Keterangan tambahan tersebut tidak mempunyai sebarang kaitan kepada kes itu dan tidak akan atau tidak mungkin mempunyai pengaruh menentukan keputusan PKP.

Oleh Sulaiman Daud HMR menyampaikan penghakiman menyetujui berasingan (Mohd Ghazali Yusoff HMP menyetujui):

(1) Kedua-dua syarat di bawah A. 56 k. 1(3A)(a) dan (b) KMT adalah kumulatif dan bukannya disjunktif.

(2) Kenyataan perayu mengenai ketaksahan tidak ditimbulkan sebagai suatu pembelaan semasa pendengaran kes walaupun ianya suatu fakta di dalam pengetahuan khas beliau. Rayuan ini seharusnya ditolak atas alasan ini sahaja.

(3) Lagipun, keterangan tambahan tersebut tidak konsisten dan juga bertentangan dengan bukti yang ditimbulkan terdahulu dan bertentangan dengan pembelaan perayu apabila menentang permohonan responden di bawah A. 14, dan tidak mungkin mempunyai pengaruh menentukan keputusan PKP.

(4) Perayu melalui afidavitnya cuba bukan hanya untuk mengemukakan keterangan baru, tetapi juga cuba memperkenalkan suatu pembelaan baru yang terletak di luar skop A. 56 k. 1(3A) KMT.

Case(s) referred to:

Chai Yen v. Bank of America National Trust & Savings Association [1980] 2 MLJ 142 ***(refd)***

Keng Soon Finance Bhd v. MK Retnam Holding Sdn Bhd & Anor [1989] 1 CLJ 897; [1989] 1 CLJ (Rep) 1 PC ***(refd)***

Ladd v. Marshall [1954] 3 All ER 745 ***(refd)***

Lam Soon Cannery Co v. Hooper & Co [1965] 2 MLJ 148 ***(foll)***

Lau Foo Sun v. Government of Malaysia [1970] 1 LNS 56 FC ***(refd)***

Milik Perusahaan Sdn Bhd & Anor v. Kembang Masyur Sdn Bhd [2003] 1 CLJ 12 CA ***(refd)***

Tsoi Ping Kwan v. Loh Lai Ngoh & Anor [1997] 3 CLJ 552 CA ***(refd)***

Legislation referred to:

Rules of the High Court 1980, O. 14, O. 56 r. 1(3A)

For the appellant - Malik Imtiaz Sarwan (Mathews Thomas Philip & Khor See Yimn with him); M/s Thomas Philip
For the respondent - Teng Chong Moi; M/s Lee Ong & Kandiah

[Appeal from High Court, Kuala Lumpur; Suit No: D3-22-1049-2001]

Reported by Anne Khoo

JUDGMENT

Abu Samah Nordin JCA:

[1] This is an appeal by the defendant against the decision of the learned High Court judge who dismissed her application to adduce further evidence pursuant to O. 56 r. 1(3A) of the Rules of the High Court 1980 ("RHC"). For convenience the parties in this appeal are referred to as the plaintiff and defendant just as they were described in the original action.

[2] The facts can be briefly stated as follows. By a letter of offer dated 24 July 1995 the plaintiff granted the defendant a credit facility of US$7 million ("the facility") for the purpose of share financing and/or share trading. The defendant agreed to the terms and conditions of the facility and duly signed the said letter of offer ("the facility agreement"). The facility is governed by the laws of Singapore.

[3] When the defendant defaulted on the terms and conditions of the facility the plaintiff commenced an action to recover the balance outstanding under the facility, which stood at US$6,624,735.67 as at 1 June 2001, with interest and costs.

[4] On 24 June 2002 the senior assistant registrar ("SAR") granted summary judgment to the plaintiff for the amount claimed with interest and costs. Being dissatisfied with the said decision, the defendant appealed to the judge in chambers. The appeal is still pending.

[5] In the meantime, the defendant filed an application to the judge in chambers to adduce further evidence at the hearing of the appeal proper. The learned High Court judge dismissed the said application with costs. Hence the appeal before us.

[6] The issue before us is whether the learned judge had applied the correct tests when he dismissed the defendant's application for further evidence under O. 56 r. 1(3A) of the RHC.

[7] The further evidence that the defendant seeks to adduce at the appeal proper is in the form of an affidavit affirmed by her on 14 March 2003.

[8] In the said affidavit the defendant deposed that on 15 September 2002 she received a telephone call from one Ms Mary Goh, who was formerly the Vice President, Deputy Head – Private Banking of the plaintiff. She could not be contacted but there was a voice mail message asking her to return the telephone call, which she did on the same day. It was in the course of their telephone conversation that the defendant enquired whether Ms. Mary Goh had any information which could be of any assistance to her in respect of the plaintiff's action against her. Ms. Mary Goh told the defendant that the facility that she was being sued was one of several facilities that had been established by her husband through various nominees as part of a wider scheme put in place by her husband with the plaintiff to circumvent the single customer limit imposed under the laws of Singapore. Ms. Mary Goh also confirmed that the personnel of the plaintiff including one Mr. Soh Chye Guan, the then Vice President, Head – Private Banking of the plaintiff, were aware of this and participated in the scheme. Both Ms. Mary Goh as well as Mr. Soh Chye Guan were however unwilling to affirm any affidavit to that effect.

[9] The learned judge dismissed the defendant's application principally on the following grounds. First, he held that the proposed further evidence was just bare allegation as the facility agreement (exh. SG1) was entered into between the plaintiff and the defendant in her personal capacity and not as a nominee for her husband. Secondly, the plaintiff's cause of action against the defendant was based on the facility agreement, which terms and conditions can only bind the parties therein. As such the learned judge was unable to see the relevancy of the proposed further evidence for the purpose of the appeal to the judge in chambers against the SAR's decision. Thirdly, the defendant failed to plead the statute or public policy which the plaintiff was alleged to have contravened leaving the plaintiff helpless to rebut the defendant's allegations specifically. Accordingly, the learned judge held that the defendant had failed to show cause why the proposed further evidence should be granted under O. 56 r. 1(3A) of the RHC.

[10] Learned counsel for the defendant submitted that the learned judge erred in delving into the merits of the defence in dismissing the defendant's application under O. 56 r. 1(3A) of the RHC, as the appeal against the summary judgment was still pending.

[11] In their written submissions the learned counsel for both parties share the same view that the tests for the admission of fresh evidence under O. 56 r. 1(3A) of the RHC are as laid down in *Ladd v. Marshall* [1954] 3 All ER 745, which tests had been adopted by the Federal Court in *Lau Foo Sun v. Government of Malaysia* [1970] 1 LNS 56 FC and referred to by this court in *Milik Perusahaan Sdn Bhd & Anor v. Kembang Masyur Sdn Bhd* [2003] 1 CLJ 12. What they disagree is on the sufficiency or materiality of the evidence before us.

[12] In *Ladd v. Marshall, supra*, Lord Denning, at p. 748 said:

> In order to justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial: second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive: third, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, although it need not be incontrovertible.

[13] Suffian FJ (as he then was) in *Lau Foo Sun v. Government of Malaysia, supra,* restated the tests as follows:

> To justify the reception of this evidence three conditions must be fulfilled:
>
> First, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial;
>
> Second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive;
>
> Third, the evidence must be such as is presumably to be believed, or in other words, it must be apparently creditable, although it need not be incontrovertible.
>
> These were the tests enunciated by Denning LJ (as he then was) at page 748 in *Ladd v. Marshall*[1].

[14] Paragraph (3A) of r. 1 of the RHC was introduced in 1993 by way of an amendment to O. 56 of the RHC: See PU(A)192/93. It reads as follows:

> (3A) At the hearing of the appeal fresh evidence shall not be admitted unless the Judge is satisfied that:
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> (a) at the hearing before the Registrar the new evidence was not available to the party seeking to use it, or that reasonable diligence would not have made it so available; and
>
> (b) the fresh evidence, if true, would have had or would have been likely to have had a determining influence upon the decision of the Registrar.

[15] Under O. 56 r. 1(3A) of the RHC the applicant must satisfy both the conditions in paras (a) and (b). These conditions are cumulative and not in the alternative. Non-fulfillment of any one of the said conditions may result in the application being dismissed.

[16] Learned counsel for the defendant submitted that the proposed further evidence satisfied the first limb of O. 56 r. 1(3A) of the RHC as the said telephone conversation occurred on 15 September 2002, well after the SAR had allowed the plaintiff's application for summary judgment. It was further submitted that the said evidence would have had or would have been likely to have had a determining influence on the decision of the SAR for the following reasons:

(i) the defendant was only required to raise a triable issue in an application for a summary judgment;

(ii) the illegality or contravention of public policy is a complete defence that can be taken at any stage of the proceedings; and

(iii) the further evidence suggested a scheme aimed at circumventing the regulatory framework in Singapore:

See *Keng Soon Finance Bhd v. MK Retnam Holding Sdn Bhd & Anor* [1989] 1 CLJ 897; [1989] 1 CLJ (Rep) 1.

[17] It is not disputed that the further evidence divulged in the course of the telephone conversation was not available at the hearing of the plaintiff's application for summary judgment. But that by itself does not satisfy the conditions for admission of

further evidence under O. 56 r. 1(3A) of the RHC. The further evidence must be such that, if true, it would have had or likely to have had a determining influence upon the decision of the SAR. It is clear that such further evidence would come from the defendant's affidavit alone. The defendant had, in her affidavit candidly admitted that both Ms Mary Goh and Mr. Soh Chye Guan were not willing to affirm any affidavit in support thereof.

[18] Learned counsel for the plaintiff had pointed out that the defendant did not allege that she was a nominee of her husband during the application for summary judgment, a fact which would clearly have been within her own knowledge. She never denied executing the facility agreement. In fact she even made a proposal for settlement of the facility in her letter dated 14 December 1998. It seemed to me (without deciding on the merits of the appeal to the judge in chambers) that the further evidence that the defendant sought to adduce would not only be contrary to the stand taken by her at the hearing of the application for summary judgment but it was also in direct conflict with the documentary evidence against her. She opposed the application for summary judgment on entirely different grounds including, among others, that the plaintiff was not a valid legal entity; that the facility agreement was not stamped; that the plaintiff had failed to sell the shares deposited with it, which, if sold, would have been sufficient to settle the outstanding debt; that it was the plaintiff and not her, who breached the terms and conditions of the facility agreement; and that the amount of the claim was incorrect. It is thus apparent that the further evidence would not have had or likely to have had a determining influence on the decision of the SAR.

[19] I find that the learned judge had scrutinized all the affidavits filed by both parties and considered the submissions by the learned counsel carefully. It was the defendant's submission before the learned judge that the proposed further evidence was only available after the summary judgment was entered against the defendant and that the said evidence would have or would likely to have had a determining influence on the decision of the SAR. The plaintiff, on the other hand, contended that the proposed further evidence was just bare allegation unsupported by any document and that it would not have had or would not likely to have had a determining influence on the decision of the SAR.

[20] Having read the judgment of the learned judge, the affidavits of both parties and having considered the submissions on their behalf, I am in agreement with the learned judge that the further evidence had no relevance to the plaintiff's claim against the defendant and would not have had or would not likely to have had a determining influence upon the decision of the SAR. In *Chai Yen v. Bank of America National Trust & Savings Association* [1980] 2 MLJ 142 the Federal Court dismissed the appellant's application to introduce fresh evidence, ie, a guarantee, in a foreclosure action based on two charges, as being irrelevant.

[21] For the aforesaid reasons, I agreed that the appeal be dismissed with costs and that the deposit be paid out to the plaintiff to account of taxed costs.

Sulaiman Daud JCA:

[22] The plaintiff is a company incorporated in France with a branch office in Singapore. The defendant is a Malaysian citizen with her last known residential address at No. 10 Jalan Hujan Rahmat, Oversea Union Garden, 58200 Kuala Lumpur.

[23] By a letter of offer dated 24 July 1995, the plaintiff granted to the defendant a credit facility of US $ 7 million ("the facility'). The facility is governed by the law of Singapore.

[24] When the defendant breached the terms of the facility agreement, the plaintiff commenced the present action to recover the balance outstanding under the facility together with interest. On 24 June 2002, the senior assistant registrar ("SAR") granted summary judgment to the plaintiff against the defendant for the amount claimed with interest and costs. The defendant appealed to the judge in chambers against the decision.

[25] Prior to the hearing of the said appeal, the defendant applied to the judge for leave, under O. 56 r. 1(3A) of the Rules of the High Court 1980 ("RHC"), to adduce further evidence at the appeal. The further evidence sought to be adduced is in the form of an affidavit sworn on 14 March 2003 by the defendant herself ("the said affidavit"). The application was refused, and hence the present appeal.

[26] In the said affidavit, the defendant averred that on 15 September 2002 she received a message on her voice-mail from one Ms Mary Goh, who was then the deputy director and an assistant head of the plaintiff's private banking. She returned the call. In the course of the telephone conversation she was told by the said Mary Goh that the facility for which she was being sued in the present action was one of the several facilities that were granted to her husband by the plaintiff through various nominees as part of a scheme perpetrated by her husband and the plaintiff to circumvent the limit of banking facility that may be granted to a single customer under the law of Singapore. Mary Goh also informed her that there were other officers of the bank, including one Mr. Soh Chye Guan, who were aware of the scheme.

[27] The learned judge refused to grant leave on three main grounds. First, he was of the view that the evidence sought to be adduced were merely bare allegations as the facility agreement clearly showed that it was entered between the plaintiff and the defendant only. Secondly, he failed to see how such evidence is relevant to the facility in question which was granted to the defendant personally. Thirdly he found that the defendant has failed to plead specifically the statute or policy that had been contravened or breached.

[28] Mr. Malik Imtiaz Sarwan, for the defendant, submitted that the learned judge had erred in delving into the merit of the defence in refusing to grant leave. He contended that in hearing the present application, the learned judge was only required to consider whether the further evidence satisfy the test laid down in O. 56 r. 1(3A) of the RHC. In support of his submission, learned counsel referred to several authorities on this subject, including *Milik Perusahaan Sdn Bhd & Anor v. Kembang Masyur Sdn Bhd* [2003] 1 CLJ 12, and *Lau Foo Sun v. Government of Malaysia* [1970] 1 LNS 56.

[29] The principles governing the admission of fresh evidence where there has been 'a trial or hearing on the merits' were laid down by the English Court of Appeal in *Ladd v. Marshall* [1954] 3 All ER 745. However, the three conditions that have to be fulfilled as set out therein are not applicable to interlocutory matters (see *Tsoi Ping Kwan v. Loh Lai Ngoh & Anor* [1997] 3 MLJ 165. The power of a judge to admit fresh evidence at the hearing of an appeal in respect of interlocutory matters is provided in O. 56 r. 1(3A) of the RHC which reads as follows:

A (3A) At the hearing of the appeal fresh evidence shall not be admitted unless the judge is satisfied that:

(a) at the hearing before the Registrar the new evidence was not available to the party seeking to use it, or that reasonable diligence would not have made it so available; and

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(b) the fresh evidence, if true, would have had or would have been likely to have a determining influence upon the decision of the Registrar.

C **[30]** In *Lam Soon Cannery Co. v. Hooper & Co* [1965] 2 MLJ 148, it was held that the three conditions set out in *Ladd v. Marshall*, *supra,* for the admission of the fresh evidence are not alternative but cumulative. Likewise, in our observation the two conditions set out in the said rule for the admission of such evidence are also cumulative and not disjunctive.

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[31] Learned counsel for the defendant contended that the defendant had fulfilled both the conditions set out by the said rule for the fresh evidence to be adduced at the appeal. He argued that the first condition was satisfied as the telephone conversation E occurred on 15 September 2002 after the SAR had allowed the plaintiff's application for summary judgment. He further argued that such evidence would have had or would have been likely to have had a determining influence upon the decision of the SAR.

F **[32]** With respect we are unable to agree with him. The evidence sought to be adduced was to the effect that the said facility was not given to the defendant personally but as a nominee of her husband who had also been granted other such facilities by the plaintiff through other nominees. The defendant seeks to use the G fresh evidence to show that the said facility agreement entered between the parties was illegal and unlawful under the law of Singapore which sets out the limit of banking facilities that may be granted to an individual. In our view, to support such line of defence the defendant has to plead, among others, that she H entered into the facility agreement with the respondent as a nominee of her husband. However the same was not so pleaded in her defence. Further, we agree with learned counsel for the plaintiff that it is within the defendant's special knowledge whether she signed the facility agreement as the nominee of her husband I since she did not deny signing the same. We would dismiss the present appeal on this ground alone.

[33] In addition, we are also in agreement with the learned judge that the defendant had also failed to satisfy the second condition that the further evidence as a whole 'would have had or would have been likely to have a determining influence upon the decision of the registrar'. We observed that the further evidence sought to be adduced is inconsistent and at variance with the evidence adduced in her earlier affidavits opposing the O. 14 application. The affidavit evidence clearly showed that the defendant did not deny signing the facility agreement, but instead opposed the said application on the following grounds:

(a) that the said facility agreement (exh "SG1") is not admissible in evidence as it was not stamped;

(b) that she did not remember giving instruction to the plaintiff to disburse the said facility;

(c) that she did not make any application to extend the period of the facility exceeding the original period of six months;

(d) that the plaintiff has breached the terms of the facility agreement in not fulfilling her request for the facility to be paid out in Japanese Yen;

(e) that the plaintiff has failed to inform her on the status of the share certificates used as security for the facility;

(f) that she denied receiving the notice of demand, or that she has not breached the facility agreement.

[34] The evidence clearly showed that the defendant had full charge and control of the said facility. There is nothing in her affidavit that showed or could be construed as showing that she was a mere nominee of her husband. She made all the positive assertions and denial on her behalf and not as a nominee of her husband. She even submitted her proposal for settlement of the outstanding balance to the bank. As such, we are of the view that the new evidence is of no relevance to the defendant's case and would have no determining influence on the decision of the SAR.

[35] Further, it is clear from the wording of O. 56 r. 1(3A) of the RHC that it only applies to the introduction of fresh evidence which was not available at the hearing before the registrar. However, in the present case, we observed that the defendant by

her affidavit not only seeks to adduce fresh evidence but also to introduce a new line of defence which, in our view, is outside the scope of the said order. It must not be allowed as there must be an end to litigation.

[36] For the reasons aforesaid, we unanimously dismissed the appeal with costs. The orders of the High Court were affirmed, and the deposit to be paid out to the plaintiff to account of taxed costs.

Mohd Ghazali Yusoff FCJ:

[37] I have read the respective judgments in draft of my learned brothers Abu Samah Nordin and Sulaiman Daud, JJCA and I agree with them.